

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

4 DONNA CURLING, ET AL., :  
5 PLAINTIFFS, :  
6 VS. : DOCKET NUMBER  
7 BRAD RAFFENSPERGER, ET AL., : 1:17-CV-2989-AT  
DEFENDANTS. :  
:

**TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS**

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT JUDGE

JUNE 12, 2020

3:37 P.M.

21 MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED

***TRANSCRIPT PRODUCED BY:***

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( . . . cont'd . . . )

1       (...cont'd....)

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# PROCEEDINGS

(Atlanta, Fulton County, Georgia; June 12, 2020.)

3 THE COURT: Good afternoon. This is Judge Totenberg.  
4 Sorry to keep you-all waiting. Running between the court and  
5 the house was not what I had in mind quite as much.

6 All right. Ms. Welch, are we ready?

7                   COURT REPORTER: Yes, ma'am. I think all parties are  
8 represented. I think we have about 18 or 19 people on the  
9 call.

10 THE COURT: All right. Can we just go through the  
11 names of counsel here for each -- for the parties?

12 MR. BROWN: Your Honor, this is Bruce Brown for the  
13 Coalition plaintiffs.

14 MR. McGuire: And Robert McGuire for Coalition as  
15 well.

16 MR. CROSS: Your Honor, this is David Cross for  
17 Curling plaintiffs.

18 MS. KAISER: Mary Kaiser is on for Curling plaintiffs  
19 as well.

20 MR. SPARKS: Adam Sparks for the Curling plaintiffs.

21 MR. POWERS: John Powers for the Coalition  
22 plaintiffs.

23 COURT REPORTER: Mr. Knapp, are you still on?

24 Judge, Mr. Knapp was on the call. He may have  
25 dropped off. But Mr. Sparks is on as well.

1                   THE COURT: Okay.

2                   COURT REPORTER: So he will probably call back in.

3                   THE COURT: What about the State?

4                   MR. TYSON: Your Honor, Bryan Tyson for State  
5 defendants.

6                   MR. RUSSO: Your Honor, Vincent Russo for the State  
7 defendants.

8                   MR. BELINFANTE: Good afternoon, Your Honor. This is  
9 Josh Belinfante for the State defendants.

10                  MS. BURWELL: Kaye Burwell and David Lowman for  
11 Fulton County.

12                  MR. MILLER: Your Honor, this is Carey Miller also  
13 here for the State defendants.

14                  MS. PARADISE: Your Honor, Loree Paradise here for  
15 the State defendants.

16                  MR. JACOUTOT: Bryan Jacoutot here for the State  
17 defendants.

18                  THE COURT: All right. I obviously would have  
19 preferred if we didn't have to have this phone conference and  
20 it didn't have to get to this point. Let me just ask really a  
21 few basic questions.

22                  First of all, to the plaintiff, why is it -- if there  
23 are something like two-thirds of the DREs that you basically  
24 know from just an overall number perspective you are not going  
25 to use or need, why are you not just releasing those?

1                   MR. CROSS: Your Honor, this is David Cross. We did.  
2 I mean, to be honest, I guess we have been confused since  
3 February 10 when we sent a letter identifying by machine ID the  
4 machines that we thought needed to be preserved on a sample  
5 basis. And it is actually a lot more than two-thirds because  
6 the machine IDs get reused.

7                   So even though I think it is roughly maybe 10,000 or  
8 so machine IDs that are on our request, we think it is a small  
9 fraction of that that actually corresponds to individual units.

10                  But in any event, candidly, Your Honor, I think that  
11 is a question for defendants. I don't understand why those  
12 haven't been released.

13                  One thing we have also learned is there are a variety  
14 of ways for the State to match the machine IDs to individual  
15 units, to serial numbers, whether it is the recap sheets that I  
16 think Mr. Barnes points out in his declaration. I think  
17 Mr. Barnes' declaration also suggests that you could do this  
18 with the memory cards.

19                  We have talked to Dr. Halderman and looked into this.  
20 It looks like he could do it electronically fairly easily using  
21 the memory cards. Because if the memory cards are plugged in  
22 to the DRE machine, the serial number for that machine, as I  
23 understand it, is imprinted on the card. So they have been  
24 preserving or supposed to preserve the memory cards as well.  
25 That would be another easy way to do this.

1                   So the short answer is, Your Honor, I don't know why  
2 the machines haven't been released.

3                   THE COURT: So is the estimate of \$36,000 roughly a  
4 month including every single machine? The question is to the  
5 State. Or is it for a smaller segment of the case -- of the  
6 machines?

7                   MR. TYSON: Your Honor, this is Bryan Tyson. The  
8 \$36,000 a month is the charge from the vendor to store the  
9 entirety of the universe of machines. And I think it is an  
10 important point to recognize that the list of machine IDs tells  
11 us nothing about which machines we could release and which ones  
12 we cannot release.

13                  It is almost like if you had license plates or cards  
14 and in each election you change the license plate for each  
15 vehicle. A list of license plates numbers is not going to tell  
16 you what the vehicle identification numbers are for particular  
17 vehicles you are trying to locate.

18                  And so while we have a list of 10,000 machine IDs,  
19 there's additional steps that would have to be taken, as this  
20 is the first I have heard of a memory card method. But even  
21 using that would require inserting one memory card at a time  
22 for each election to determine what serial numbers were used.

23                  So we are at a point where we have no idea what  
24 serial number units the plaintiffs wish to be preserved. So we  
25 can't release 20,000 of the machines.

1                   THE COURT: Is that how many you think you have is  
2 20,000?

3                   MR. TYSON: No, Your Honor. We have --

4                   THE COURT: Or do you have 30?

5                   MR. TYSON: No. We have roughly 30,000 DREs and  
6 several thousand optical scanners as well. I think it is close  
7 to 40,000 pieces of equipment in total, if I'm correct about  
8 that.

9                   THE COURT: You-all never talked about using a card  
10 to determine before today?

11                  MR. TYSON: No, Your Honor. But even if we did, the  
12 card method would still require us to put one card at a time.

13                  And, remember, these cards are with the counties.  
14 These cards are not maintained by the State. So we still would  
15 have to go county by county to locate this information, even  
16 assuming a card method would work.

17                  THE COURT: Okay. Did you give the numbers to the  
18 plaintiff -- let's just clarify for me what exactly you have  
19 given the plaintiffs in terms of information.

20                  And what -- I understand the whole business that  
21 every year that the number may have a different machine ID from  
22 election to election because it is assigned based on when  
23 information from the GEMS database on a particular memory card  
24 is inserted.

25                  MR. TYSON: Right.

1                   THE COURT: But -- so what information did you give  
2 to the -- precisely to the plaintiffs so that they could  
3 attempt to do a meaningful statistical sample?

4                   MR. TYSON: Yes, Your Honor. So this is Bryan Tyson  
5 again. The first thing the plaintiffs received several years  
6 ago in discovery -- it may have been last year. I don't want  
7 to -- I'm not exactly certain when. But I know it was at least  
8 a year ago the plaintiffs received a full list of all serial  
9 numbers for the DREs and optical scan units that the State has.

10                  In roughly December, the plaintiff said that was  
11 not --

12                  THE COURT: All right. Let's just stop there so I  
13 can make -- so that I understand.

14                  MR. TYSON: Certainly.

15                  THE COURT: You would think I would understand by  
16 now. But I want -- so you gave them a list of all machines and  
17 you identified it by what?

18                  MR. TYSON: By the serial number and by the county  
19 where that machine would be used.

20                  THE COURT: Okay.

21                  MR. TYSON: And so in December after we first  
22 discussed this topic in December of 2019, the plaintiffs  
23 indicated that they were going to also have to have the usage  
24 information. So for which election was each DRE used by serial  
25 number.

1                   And in order to determine that information, at our  
2 January call that we had after some discussion, we reached the  
3 conclusion that the plaintiff believed that -- the Coalition  
4 plaintiffs were confident, the Curling plaintiffs were a little  
5 less confident -- that the serial number information may be  
6 stored in the GEMS databases.

7                   So at the end of January, we provided an almost -- I  
8 believe it was in the 750 to 800 GEMS database range of  
9 databases for six elections that the plaintiff had identified.

10                  The plaintiff then notified -- there were several  
11 that we were not able to locate due to the county sending a  
12 different post-election database than they should have. But  
13 93 percent of the databases that the plaintiffs requested we  
14 turned over to them.

15                  They then proceeded to create -- basically to notify  
16 us that the serial number -- they could not identify that in  
17 the GEMS database, if I'm recalling the sequence correctly, and  
18 instead sent us a sample based only on machine ID. That was in  
19 the middle of February roughly.

20                  And a list based on machine ID does nothing to help  
21 us identify which DREs were -- which serial numbers we needed  
22 to try to locate and maintain. And, frankly, at that point, we  
23 had the preliminary injunction hearing with Your Honor at the  
24 beginning of March. And then COVID took over most things and  
25 especially for the Elections Office for the Secretary of

1 State's office. And this became a lower priority until the  
2 Governor's instructions on May 1st that all agencies were to  
3 propose 14 percent cuts, which was roughly \$800,000 for the  
4 Elections Division of the Secretary of State's office. And the  
5 Secretary's office immediately began asking again what the  
6 status of this was, considering it was a  
7 400-or-so-thousand-dollar-a-year expense to the State.

8 And our primary concern is that since we have -- we  
9 have been working on this now on and off for six months. And  
10 we still only have a list that would require an extensive  
11 manual process of either going memory card by memory card. If  
12 this is a method -- first I have heard of it. If this is a  
13 method that works, it would still require one memory card at a  
14 time.

15 Otherwise, it is a hand search through paper -- DRE  
16 recap sheets and other methods to go try to reconcile machine  
17 IDs to serial numbers and then remove duplicates from the list  
18 and then try to locate those serial numbers in the machines  
19 that are currently only stored in county order, not in any sort  
20 of serial number order as we have explained.

21 THE COURT: Okay. So let me ask the plaintiff. I  
22 know you say you only needed portions of these and it is a  
23 small portion of these. So -- but you don't know precisely  
24 what because of the challenges that are identified by all of  
25 you.

1           But why not just take a -- kind of a somewhat more  
2 generous group than you would have normally -- why is that --  
3 from different counties? It is imperfect. But it at least  
4 could -- it would release a large number even of the DREs  
5 for -- because I'm assuming you are not really offering to take  
6 responsibility for all of the DREs.

7           I have seen you saying that you are willing to pay  
8 the cost for -- I don't know -- some. But I don't -- I'm not  
9 sure -- it seems like a very difficult place to go right now to  
10 have everyone chasing after -- looking for the right serial  
11 number. And, you know, right now -- I mean, you thought -- and  
12 I don't say anything negative about it.

13           But obviously your folks thought that they were going  
14 to be able to tell this from the GEMS database, and they  
15 couldn't. And maybe they will be based on the card. But you  
16 don't know really whether it got wiped or what has happened  
17 with it.

18           So -- and maybe you'll be able to get that and be  
19 able to determine that. But my recollection of the origin of  
20 this all, which sort of kind of goes back to both sides, is  
21 that one of the principal reasons you thought it was necessary  
22 was because the defendants might appeal on the merits and you  
23 wanted to be able not to be deprived of your evidence, which I  
24 understood, and no one would agree to having the -- on the  
25 defendants' side to having the last preliminary injunction

1       ruling be a decision on the merits.

2           But at the same time, you know, there is a reality of  
3       the budget and of utility of this and the fact that we are  
4       dealing with a lot of counties. So I mean -- it looks like the  
5       perfect -- it could be the enemy of getting this done.

6           MR. CROSS: Your Honor, this is David Cross. I guess  
7       a few thoughts to answer your question a bit. The original  
8       thinking with the sampling was to get to as small a number as  
9       we could based on the information we had.

10          THE COURT: Yeah.

11          MR. CROSS: With all due respect to Mr. Tyson, it is  
12       not really accurate to say the machine IDs do nothing to help  
13       move this forward. Again, Mr. Barnes' own declaration talks  
14       about ways to match up, as I recall his declaration, using  
15       recap sheets or other things to match up the machine IDs to  
16       serial numbers.

17          We think there is a way to do that with the memory  
18       cards. We think the memory cards -- our understanding is they  
19       match also with the vendor, not be distributed across the  
20       counties --

21          THE COURT: Go slower. Because I'm not catching it.  
22       And if I'm not, then Ms. Welch isn't.

23           Go ahead.

24          MR. CROSS: So with respect to doing it by the memory  
25       cards, we have not had that discussion because the defendants

1 decided that they would only communicate with us through a  
2 briefing with the Court, which is what Mr. Tyson --

3 THE COURT: All right. All right. We're not going  
4 to spend time on all of that. Here we are.

5 MR. CROSS: I understand. Yeah, I understand. But  
6 the question was raised on why we haven't talked about it.  
7 That is why.

8 THE COURT: Okay.

9 MR. CROSS: As to whether -- as to whether it can be  
10 done, Dr. Halderman thinks it can be done. There are a couple  
11 of ways to do that. They could give us the -- give us access  
12 to the memory cards and let us do the work. He has written a  
13 script that he thinks will pull the serial numbers  
14 automatically.

15 So this is the type of discussion we would love to  
16 have with them to try to work that out. We think there may be  
17 a way to do it.

18 Another possibility would be: If the machines are  
19 all sitting in a single vendor in a single location, then it  
20 could be that we could just take a random sampling from that --  
21 that room.

22 The challenge for us is we do want to make sure we're  
23 getting a representative sample from each of the relevant  
24 elections, like the midterm elections in 2018. And so if you  
25 just take a random sampling from any given county, for example,

1 you could end up with machines that were used, say, in 2019 but  
2 not 2018. Or you might miss entire precincts that might be  
3 significant.

4 And so if they are all now grouped together in one  
5 place, depending on how they are organized in the room, it may  
6 be there is a simpler way to do this. We just don't really  
7 have the information to figure that out.

8 The last point I'll make on the cost piece is, you  
9 know, one of the key reasons we wanted more time -- part of  
10 that was to try to figure out other ideas to make this work.  
11 But it is also to try to understand the cost. Because that is  
12 the principal, if not the only, basis on which the State seems  
13 to be seeking the relief.

14 And we don't have any information on where that  
15 number is coming from. We have sent out an Open Records  
16 request beginning over a week ago. We are told it would take  
17 time to get responses. But one county, Cobb, has responded.  
18 And according to Cobb County from the election director there,  
19 with respect to preserving DREs, what they conveyed to us  
20 today -- and I quote -- there is no cost associated with  
21 storage. And so I imagine --

22 THE COURT: Well, is it all being stored though at  
23 one facility though? That is what --

24 MR. CROSS: That is what we don't know. What the  
25 Cobb County director conveyed to us was she identified a

1 location where DREs were being stored. It looks like it is  
2 maybe a county fire department from what we can tell. She said  
3 there is no cost associated with that.

4 So the challenge we have is the defendants will  
5 communicate with us only through you. And so we can't really  
6 get the information we need to figure out where are the  
7 machines. That influences what type of methodology we might be  
8 able to use. If they are all in one location together, that is  
9 one thing. If they are spread out across counties, that is  
10 another.

11 We don't really understand what the cost actually is.  
12 So we can't respond to whether we can cover that cost. We  
13 can't evaluate whether we could reduce that cost. We just  
14 don't know. And so we would really like to work this out.  
15 With some additional time to respond to the motion and maybe a  
16 bit more information at least from the folks who are willing to  
17 give it to us from the counties or the State would put us in a  
18 better position to maybe resolve this.

19 MR. TYSON: Your Honor, this is Bryan Tyson. I think  
20 I can answer some of Mr. Cross' questions with the discussion  
21 we had in January on this point. There are three counties that  
22 are storing DREs under separate preservation orders from the  
23 Court. And as we discussed in January, Cobb, Dekalb, and  
24 Fulton all have DREs that the county is still maintaining, the  
25 State has not picked up, because they are subject to the

1 preservation orders this Court entered shortly after this case  
2 arrived in your courtroom several years ago.

3                   Those are separate and distinct from the DREs that  
4 were picked up from the vendor as the BMDs were deployed to  
5 each county. And as we talked about in January, they were  
6 loaded into essentially units per county and brought to a  
7 central storage place that the vendor maintains.

8                   This is a vendor, as we explained in January, that  
9 takes care of electronic disposal for the State. And they bill  
10 the State a flat \$36,000 a month for the warehouse space to  
11 store the DREs that they collected as part of the preservation  
12 process. And as soon as the DREs are released from the Court's  
13 preservation orders, those DREs can then be disposed of using  
14 the existing electronic disposal process the State uses.

15                  I understand Ms. Kaiser sent an Open Records request  
16 to Cobb County today. But the reality is that is not the DREs  
17 we're talking about.

18                  That we think is actually an excellent subset of a  
19 sample. If we could dispose of the ones that are being stored  
20 centrally by the State and just proceed with the sample of the  
21 units that was already being maintained by Cobb, Fulton, and  
22 Dekalb, that is already an identified subsample that has not  
23 been used in subsequent elections and could be the ideal  
24 sample.

25                  So in our minds, that is the ideal solution here

1 rather than having the State maintain all 30,000 units.

2 THE COURT: So what is wrong with that proposal?

3 This is to the -- this is to plaintiffs' counsel.

4 MR. CROSS: Your Honor, this is David Cross. I'm not  
5 sure what is in that sample. If it is -- if it is -- if it  
6 includes the machines that were sequestered beginning in, I  
7 think, 2017 or 2018, what would pop out to me is I don't think  
8 that would include any of the recent elections, like the 2018  
9 midterm, which is a key election.

10 Again, I don't know what is in that. This is the  
11 first I recall hearing that there are still machines that are  
12 at the counties. I mean, the filing that just came in  
13 certainly read to us to indicate that all of the machines were  
14 collected by the State.

15 And so, again, this is part of what we're trying to  
16 figure out is where are the machines. It is not clear to us  
17 why the State collected them and is incurring a lot of money  
18 when it looks like the counties were storing them for free.

19 And there is no indication whether the State has  
20 explored other means of preserving some of these things as  
21 opposed to paying this vendor which looks to be quite  
22 exorbitant fees.

23 But in any event, I think if we could have a  
24 discussion and exchange information, we could probably work  
25 this out. And Your Honor doesn't want to hear it. But we

1 haven't been able to do that. So I'm not sure how to go  
2 forward.

3 THE COURT: Well --

4 **(Unintelligible cross-talk)**

5 THE COURT: Right. Let me just say this. I mean,  
6 you want until the 29th. Or on the practical litigation  
7 perspective, you want until June 29. And there are  
8 approximately ten days left in the legislative session. I  
9 don't know how they are going to space those. They only count  
10 the days they actually have proceedings. I don't -- you know,  
11 the way the legislature works is not necessarily always  
12 100 percent, let me say, transparent about what days they are  
13 going to be counting or not.

14 But it is one thing to actually -- certain sorts of  
15 meetings are held and committee meetings don't count  
16 necessarily and -- but -- but I'm sure no matter what they are  
17 aiming to be out by July 2nd, if not beforehand.

18 And so, you know, it doesn't really do us much good  
19 for you to -- unless you can resolve this, it doesn't do us  
20 much good to resolve this on the Friday before the July 4th  
21 week because -- or the 30th because then basically the budget  
22 is about to be approved. That is why they are hot to trot.

23 MR. CROSS: Your Honor, I understand that.

24 There's --

25 THE COURT: So I don't -- I mean, I don't know what

1 you are looking for further. I mean, to me, I wasn't clear  
2 whether there were more Open Records Act requests that you were  
3 wanting to make in the -- or you were trying to hold -- or you  
4 were waiting for the responses still pending the Open Records  
5 Act requests or both.

6 MR. CROSS: So we have Open Records requests that  
7 went out last week. We're waiting for the responses. What has  
8 been indicated so far is that it will take more than the three  
9 days. We don't know exactly when that will come.

10 We have some additional ones that we sent out this  
11 week. And so we are trying to build in a window to get those  
12 responses. We also need to work with our experts in trying to  
13 figure out things like, you know, whether the memory card piece  
14 works. So that's why we were building in the time.

15 Again, we are sensitive to the situation the State is  
16 in. But as Mr. Tyson began this call, he said this was not --  
17 his words are low priority for the State. So just to say that  
18 we're going to get crunched because they decided not to address  
19 this for three months, that doesn't -- that doesn't seem  
20 like --

21 THE COURT: Well, you didn't address it either for a  
22 while, I mean, it looks like. I mean, it wasn't like you sent  
23 out Open Records requests a month ago.

24 MR. CROSS: We --

25 THE COURT: I mean, I --

1                   MR. CROSS: We did what we were supposed to do, and  
2 we sent samples. I'm not sure what more we could have done.  
3 They could have released lots of machines. In those three  
4 months, they could have matched up the machine IDs and the  
5 serial numbers probably for less than they are paying per  
6 month.

7                   They could have worked their best to figure that out.  
8 But they didn't. So now they want to say it is a time crunch  
9 of their making. We -- respectfully, Your Honor, I think we're  
10 entitled to enough time to get the information we need to  
11 respond and not be squeezed just because they made it a low  
12 priority for half a year.

13                  THE COURT: Well, it is a complicated thing about the  
14 low priority let me just say.

15                  But did I correctly summarize why you want them, or  
16 is there some other reason you want them beyond what I said?  
17 I'm not trying to diminish the importance of that. I'm just  
18 trying to make sure I understand.

19                  Is that what you want so far? How much -- what is  
20 the -- I mean, it does seem like real work to be able to -- to  
21 trace all of this down. It seems like, you know, it is at  
22 least a pain in the neck at a time when there is not a lot of  
23 extra resources. And I don't mean money. I mean people in  
24 some ways.

25                  MR. CROSS: And we're happy to do that. I mean, if

1 we could get, for example, the recap sheets or the memory  
2 cards, we're happy to do the tedious work of matching. It is  
3 just a matter of collecting on their part and providing it.

4 THE COURT: Well, you are willing to do that work and  
5 not bill for that work?

6 MR. CROSS: You mean not seek fees later? Sure.  
7 Absolutely. We would absolutely do that.

8 THE COURT: What is wrong with that proposal,  
9 Mr. Tyson?

10 MR. TYSON: Your Honor, certainly I'll refer us back  
11 to our January conversation about how the DRE recap sheets are  
12 stored by the Secretary's office. All the post-election  
13 information is stored in a folder for each county after each  
14 election. And there is a variety of documents that is more  
15 than just the DRE recap sheet.

16 And a county may range from a half inch thick up to a  
17 foot or two thick of paper documents for that particular  
18 election. The DRE recap sheets aren't in any particular point  
19 in that folder.

20 And so in order for us to even begin to give  
21 documents to the plaintiffs to start this process, if they were  
22 going to conduct this analysis, we would have to engage  
23 Elections Office staff, which frankly is already stretched very  
24 thin trying to run the elections in the midst of COVID, to go  
25 pull out all that information and then turn it over to the

1 plaintiff and have them, I guess, do a manual entry of all the  
2 DREs -- all the DREs used in a particular election.

3 So I mean, I appreciate Mr. Cross' willingness to  
4 take on a Herculean task. But it would require a lot of work  
5 on the front end. And we would also for past elections have to  
6 go back to the archives, get all the election documents out.

7 And I'm still struggling to understand from a  
8 mootness and relevance standpoint why we're engaging in all of  
9 this activity. We have-- I feel like we have been very, very  
10 clear from the January call, from our filings, from the  
11 documents.

12 On Page 5 of our filing about this, we talked about  
13 the fact that there were machines sequestered with the counties  
14 that we have not collected and those are different than the  
15 machines that we have collected.

16 So the reality for us is we're now six months down  
17 the road here. We're now in a budget crisis that no one  
18 anticipated. And we're trying to do the best we can to free up  
19 resources to allow the elections process to be funded for  
20 people to have it function in Georgia. And this is an expense  
21 that obviously -- these are about machines that are -- the  
22 claims are moot. There is no relevance to going through this  
23 process and digging these out at this point.

24 THE COURT: Well, obviously, they dispute that the  
25 claims are moot. And I guess to the -- on that point, I'm more

1 likely to agree with them. Whether, you know -- whether this  
2 volume of work at this juncture is worth it is another matter.  
3 But, of course, it depends on if -- you know, what we went  
4 round and round about before, which is, you know, is the State  
5 going to appeal on the -- on the preliminary injunction and  
6 what -- where do we go from here. Because if you are saying  
7 that they -- if I were to rule that they are not moot, you seek  
8 an interlocutory appeal on that or something else, you know, we  
9 are just -- and then I'm in a position where I wouldn't have  
10 allowed them to do this -- I didn't allow them to do discovery.  
11 So, you know, it is sort of a rock and a hard place.

12 That is why the first part of this was originally,  
13 well, is the State willing to agree to judgment on -- at least  
14 partial judgment, which I never -- you know, no one ever  
15 indicated you were. So that is why we are -- partly why we are  
16 here.

17 MR. BROWN: Your Honor, this is Bruce Brown with the  
18 Coalition. Just a couple of very quick points.

19 First, the State, you know, continues to not address  
20 the federal law that requires them to keep the DREs anyway for  
21 22 months after the 2018 election. And we keep on like -- I  
22 know we're like a broken record. We keep on citing that law  
23 and the state law that requires these DREs to be maintained for  
24 two years.

25 And in response to that, we get crickets. Just

1 nothing. And so what they are asking is to violate federal and  
2 state law by -- and I don't want to get into sort of a  
3 scrimmage over that issue. But it has never been addressed by  
4 the State.

5 And so we have -- we briefed that in Document 699,  
6 which was our response back in January. And they have never  
7 explained why they have any federal authority to be destroying  
8 these election records. That is part of, I think, the 1960  
9 Civil Rights Act or Voting Rights Act. And it is so that the  
10 Justice Department can do an investigation of a federal  
11 election up to two years after the election.

12 So that, I think, should sort of decimate their claim  
13 that they should be able to destroy these records or, as they  
14 have done in the media, blame this litigation for these costs.  
15 It is just not -- that is just not so.

16 And, also, they can't have it both ways. They can't  
17 complain about the costs to narrow the discovery because it  
18 takes them a long time with all the records and complain about  
19 the cost of keeping all of them. They have got to make -- and  
20 the other -- other claim they are making is that, although they  
21 are not going to consent to a final judgment, they want to  
22 pretend that it is.

23 So they have got to make some choices here. But we  
24 are behind -- with the Curling plaintiffs, we're behind  
25 narrowing the load for everybody. And we'll do what we can to

1 work with the State to do that.

2 Thank you, Your Honor.

3 THE COURT: So at 699, which of the documents is it  
4 that you are --

5 MR. BROWN: It is Document 699. I'm trying to get  
6 the page number.

7 THE COURT: I mean, there are a variety of documents  
8 in there.

9 MR. BROWN: I'm sorry. Page --

10 THE COURT: No. It is just that there are some  
11 exhibits. But that is all right.

12 MR. BROWN: Document 699, that is the pleading  
13 number.

14 THE COURT: Right. Yeah. I've got it.

15 MR. BROWN: We cite in there on Page 14 the federal  
16 law and the two state laws that control.

17 MR. TYSON: Your Honor, this is Bryan Tyson. Just to  
18 quickly dispose of that, I believe that we addressed that in  
19 our reply. I don't have the reply in front of me. But the  
20 State maintains for the two-year period all of the electronic  
21 records on CDs that are held under seal with the Clerk of  
22 Superior Court.

23 There's not -- I have never seen a case where there  
24 is an independent obligation to preserve voting machines for  
25 the two-year period. And if Mr. Brown believes that is

1 correct, I'm sure he can try to persuade the U.S. Attorney to  
2 bring an action against us. But none of that is relevant to a  
3 discovery dispute here about these machines that are right now  
4 only being maintained because of the Court's orders to maintain  
5 them right now.

6 And that is what we've tried to do for six months  
7 now, find a resolution that was workable for everybody. And  
8 we're still here. So --

9 MR. BROWN: I mean, it is just like with any  
10 discovery dispute or any obligation to preserve evidence. The  
11 law says records. Those DREs are records. And yeah, there may  
12 be some copy or supposed copy or rendition or printout from  
13 those DREs.

14 But absent any guidance from the Justice Department  
15 that it doesn't apply to these electronic records, I think it  
16 is a very scary position to take that the internal DRE memory,  
17 which contains this information, is somehow exempt from an act  
18 that says it applies to all records.

19 MR. CROSS: Your Honor, this is David Cross. One  
20 suggestion, if I may. Mr. Tyson said that part of what they  
21 would have to do with the recap sheets is to go through  
22 files -- I think he said it was half an inch to a foot thick.  
23 It sounds like there would be 159 of those, one for each  
24 county.

25 However many there are, if all they opine to do is

1 just literally pull the files and stick them in a room  
2 somewhere where we can have people go in and go through all the  
3 recap sheets, we're happy to absorb that cost as well.

4 THE COURT: What if you did that and we're just  
5 interested in whatever -- some sample of the counties? Why  
6 would they have to pull them for every single county? Why do  
7 you need that?

8 MR. CROSS: So that is a good question. And it is  
9 literally the same question I asked Dr. Halderman. The concern  
10 is that if you don't get a representative sample for each  
11 relevant election in each county and trying at least to give a  
12 representative sample of the precincts across the county you  
13 run the risk of missing something, if there was, for example,  
14 hacking that was done.

15 One of the things that Dr. Halderman and others have  
16 shown is you can hack the system by getting access to a single  
17 machine because of the way the data moves between the one  
18 machine and the GEMS database or the GEMS server.

19 So what we were looking to do was to get a  
20 representative sample across the state. I'm not sure how you  
21 pick counties. We talked about that. You know, Dr. Halderman  
22 explained, you know, how might you hack it. You might say,  
23 well, let's flip a small number of votes at a single precinct  
24 or a few machines in one precinct in Fulton and we'll switch  
25 the Republican instead of Democrat. Or, vice versa, you may go

1 to a county that traditionally votes heavily Republican and  
2 just switch a small number of votes.

3 So you don't know how it happens. So that is why we  
4 wanted a representative sample. And, again, I mean, pulling  
5 the file folders doesn't seem like it should be a difficult  
6 task.

7 We're happy --

8 THE COURT: Then there is an extra step after that  
9 though, as I understood it. I mean, are you going --

10 **(Unintelligible cross-talk)**

11 MR. CROSS: And the matching we would do. The first  
12 step would be pulling the folders. The second step is going  
13 through the folders to identify the recap sheets. It sounds  
14 like they are included with some other documents.

15 We would -- we would ask them to do step one, pull  
16 the folders. We would send people in to identify the recap  
17 sheets, get them copied. And then we would take it from there.

18 We would match the machine IDs per election to the  
19 corresponding serial numbers. Again, we think this could  
20 actually be done much easier with the memory cards. But we'll  
21 take either route. We could deal with the recap sheets.

22 We could do the matching. Then we could come back to  
23 them and say, here are the serial numbers for these machines.  
24 And so we will narrow it down to specifically identified units.  
25 We anticipate that would be a relatively small percentage of

1 what we're talking about.

2 And then it is a matter of identifying those  
3 machines. And we're happy to do that too. If they are sitting  
4 in a big warehouse, we're more than happy to send a team in.  
5 They can be supervised to track down the serial numbers in the  
6 warehouse.

7 Literally, the only thing we would be asking the  
8 State to do is to just pull those folders. We would take  
9 everything from there, and we would absorb the cost.

10 THE COURT: What happens for the other counties -- I  
11 mean, the large counties of Fulton, Dekalb, and Cobb, which are  
12 considerable?

13 **(Unintelligible cross-talk)**

14 MR. CROSS: They are all in the same location is what  
15 I understood from Mr. Tyson. Except for the ones that are  
16 sequestered specifically for this litigation separately, all of  
17 those other machines are sitting in a single location.

18 So that's why if we can get the serial numbers we can  
19 walk in to that one big warehouse, identify each machine by  
20 serial number, say these are the ones we would like you to  
21 keep, do what you want with the rest.

22 If there are any serial numbers that pop up in what  
23 just Cobb, Dekalb, and Fulton are preserving, then we could  
24 work with the counties to identify those machines. Although,  
25 again, Cobb tells us they are not incurring any costs.

1                   So we are prepared to do every single step, other  
2 than them just pulling the folders. Frankly, we'll do that too  
3 if there is a way for us to do it. But we're trying to absorb  
4 everything.

5                   MR. McGUIRE: Your Honor -- I'm sorry, David. I  
6 didn't mean to interrupt you.

7                   MR. TYSON: No. Go ahead. This is Bryan. You can  
8 proceed.

9                   MR. McGUIRE: This is Robert McGuire for the  
10 Coalition plaintiffs. I just wanted to add: We fully support  
11 everything Mr. Cross just said. But I do just want to make  
12 sure our unique, distinct position doesn't get lost in this.

13                   We're not looking for a representative sample. We  
14 are looking for particular machines that we have identified  
15 based on criteria, such as known aberrant behavior, known  
16 malfunctions.

17                   And we believe that we have a different approach that  
18 is aimed at getting the same results. But ours is based on  
19 looking at specific machines that we have identified, not based  
20 on getting a representative sample.

21                   So I don't think a solution that looks to pulling a  
22 representative sample will serve us.

23                   MR. TYSON: This is Bryan -- I'm sorry.

24                   MR. CROSS: One quick question.

25                   Rob, you can identify those machines in a way that I

1 said though; right? It is a similar process?

2 MR. McGUIRE: Yes, of course. And we could pull data  
3 into what David is proposing.

4 MR. CROSS: That is what I was going to clarify.

5 Thanks.

6 MR. TYSON: Your Honor, this is Bryan Tyson. Is part  
7 of this proposal also that the plaintiffs are going to absorb  
8 the storage costs of the entirety of DREs in the meantime?  
9 Because this is an incredibly laborious process.

10 MR. CROSS: No.

11 MR. TYSON: And I am sure the plaintiffs are  
12 incredibly efficient.

13 MR. CROSS: No.

14 THE COURT: How long do you think it will take? I  
15 mean, if we're talking about -- what sort of numbers are you  
16 envisioning? Because basically Mr. Brown might be right or  
17 wrong, but I'm not going to likely rule on that.

18 So, you know, if you are saying, all right, the  
19 State, you're going to have to have this for another 30 -- for  
20 another month, but we're going -- it is going to be off your --  
21 it will be off your back basically or the vast majority of  
22 these after that, they can look at what that is going to be for  
23 budgetary purposes.

24 MR. CROSS: So, Your Honor, I'm not sure who you were  
25 asking. This is David Cross.

1                   What I would say is my guess is they have already  
2 paid for the month of June. Mr. Tyson can tell me if that is  
3 wrong. The sooner that they can get us in with the information  
4 we're happy to knock it out. It is hard for me to say in the  
5 abstract how fast we can do it. Maybe we could do it in a  
6 week, maybe two weeks. It just depends on how quickly we get  
7 the information.

8                   But we may be able -- I mean, it is only -- what? --  
9 June 12th? It is at least theoretically possible if they get  
10 the stuff to us really quickly, like early next week or at  
11 least get our folks in to look at the documents, we could  
12 probably have this done by the end of the month. And they are  
13 not incurring any additional costs, depending on how they are  
14 being billed.

15                  MR. TYSON: David, this is Bryan. You think you will  
16 be able to get in and pull over 200,000 pieces of paper and  
17 then put it all in databases and be able to use it in three  
18 weeks?

19                  MR. CROSS: I don't know. I have got to see the  
20 paper and then sit down with our folks and figure out what is  
21 doable. We will certainly move heaven and earth to do what we  
22 can.

23                  MR. TYSON: The other --

24                  THE COURT: Go ahead.

25                  MR. TYSON: I was just going to say: The other thing

1 that the State has been trying to figure out too is is there a  
2 lower cost method of storage. And we had identified a lower  
3 cost state facility we could move these to. But the cost of  
4 moving them was such that it wouldn't be worth doing unless it  
5 was going -- the machines had to be preserved for at least  
6 three more months.

7 So there are those considerations we have to figure  
8 out with our client too depending on the time line. Because if  
9 this is a four-month process, we want to go ahead and get them  
10 into a cheaper storage facility and accede the cost of moving.  
11 If this is a one-month process, then maybe that looks  
12 different.

13 But, again, I just keep coming back to: We have  
14 raised this issue in the first of December. These machines  
15 have been decommissioned since December 31st. And we are still  
16 at this point.

17 So it is difficult for our client, especially with  
18 the legislature asking what is going on.

19 THE COURT: Well, listen, you know, it seems to me  
20 the plaintiffs are willing to look at all the paper. I mean,  
21 they could -- you could send them some cards. They could  
22 actually verify is there -- is Dr. Halderman's theory correct  
23 that he is going to be able to run the cards and it is going to  
24 be simpler that way. I don't know if it is true.

25 I assume that you-all looked at that. But maybe you

1 don't want them to have the cards. I don't know what the  
2 answer is to that. So that is sort of -- you know, that would  
3 obviously be -- if it was available with the cards, that would  
4 be potentially the simplest thing to do. But I don't know that  
5 that is so.

6 What if you were to give them a range of the cards  
7 and they could run them to see so we know by Monday evening?

8 MR. TYSON: I mean, Your Honor, I honestly don't  
9 know. I know the cards are somewhere. I have been focused on  
10 DREs and optical scanners.

11 I think if we were going to do any sort of electronic  
12 component, we're going to have to have clear boundaries in the  
13 protective order that the plaintiffs aren't conducting  
14 unlimited discovery of everything on the memory card, that it  
15 is for the sole purpose of drawing this out. Because, again,  
16 we are not -- we are passed discovery on these units. So --

17 THE COURT: So why does Dr. Halderman -- does he have  
18 some concrete basis for believing that they record this  
19 information in a way that is going to be ascertainable --

20 MR. CROSS: He does, Your Honor.

21 THE COURT: -- and not erased?

22 MR. CROSS: Well, that is the question. What we  
23 don't know is -- well, let me take a step back.

24 Our understanding is that the memory cards from the  
25 elections since this lawsuit was filed and whatever memory

1 cards they had when it was filed -- that those have all been  
2 subject to preservation. And so the memory cards for the  
3 elections that we're concerned about should all be preserved.

4 If that is accurate, then -- I was just looking at  
5 what Dr. Halderman said -- yeah. So he thinks -- he says an  
6 alternative way to identify which AccuVote DREs were used in  
7 each precinct would be to use data from the DREs' removable  
8 memory cards. The memory cards store digital records of each  
9 vote, which are later uploaded to GEMS. They also store an  
10 audit log file containing time stamped entries for each  
11 election event, such as polls being opened or closed and  
12 individual ballots being cast.

13 An example audit log from an election -- let's see --  
14 when the memory card is inserted into the DRE, it writes -- the  
15 DRE writes its serial number to the audit log.

16 So his understanding is that if the memory cards are  
17 preserved we should be -- he should be able -- he has written a  
18 script to do this, having tested it. He can pull the audit log  
19 from the memory card, which will give him the serial number  
20 that corresponds to the machine IDs. And then we can match up  
21 the machine ID in a particular election to the serial number  
22 for the DRE that was used. And then that gets us to what  
23 should be a relatively small universe of machines.

24 THE COURT: But he thought that about the GEMS data  
25 he was going to get too.

1                   MR. CROSS: Yeah. And in fairness, Your Honor, we  
2 did make clear that we just didn't know, that we were happy to  
3 explore that. And Mr. Tyson was kind enough to say at the  
4 start of this that we did not know whether we would make that  
5 work. It did not work unfortunately.

6                   All we could get was the machine IDs. Dr. Halderman  
7 thinks this will work because he has tested it. But one of the  
8 reasons we're happy to get a recap sheet and just get that  
9 going is we -- in fairness to the State, we don't want to waste  
10 more time. We don't want them to incur more costs than they  
11 have to.

12                  So we also could run these in parallel. They could  
13 send us the sample of the memory cards while getting us set up  
14 to go to the recap sheets. Dr. Halderman can look at those.  
15 If it works, great, we go that route.

16                  THE COURT: Well, I guess the question really is:  
17 What sample of memory cards would he need to have in order to  
18 actually see this was going to work? Because, you know, maybe  
19 some other memory cards have it and some of them don't.

20                  MR. CROSS: Unless the memory card is, you know,  
21 erased or overwritten, it will have an audit log and the audit  
22 log will have the serial number is my understanding. But,  
23 again, we're happy to do the recap sheet route. I mean, it  
24 doesn't -- and we would absorb, it sounds like, 95 percent of  
25 the work.

1                   THE COURT: Well, here is my view. They can make  
2 their budget and know what they are doing if you're able to  
3 give them -- if you're obligated basically to give them the  
4 information about what you want so that they can basically move  
5 on the machines by the end of July.

6                   I mean, that gets -- that seems to me -- allows them  
7 to do what they see fit, despite what Mr. Brown says, which I'm  
8 not saying he is wrong, it is just simply not really ultimately  
9 mine to deal with. If you think you're able to do it so that  
10 you can give it to them and they can basically get this done by  
11 the end of July, then they know what is in -- they reduce their  
12 budget accordingly.

13                  MR. CROSS: Right.

14                  THE COURT: Why doesn't that --

15                  MR. CROSS: I think that is fair. Again, if we can  
16 get access to the recap sheets early next week or as soon as  
17 they can do it, I don't see why we couldn't do this by the end  
18 of July.

19                  MR. BROWN: Your Honor, this is Bruce Brown.

20                  THE COURT: Well, I don't mean that you are just  
21 giving it to them the end of July.

22                  MR. CROSS: Oh, I understand. No. No. But --  
23 sorry. I understood, Your Honor. They would be in a position  
24 to release the machines by the end of July.

25                  Could I ask one quick question?

1                   Bryan, what was the transportation cost to move it to  
2 another facility?

3                   MR. TYSON: I don't recall exactly, David. I think  
4 it was in the 80-something-thousand-dollar range. But I  
5 don't -- I have not seen any specifics on that at all. So I  
6 can't tell you what the different -- I don't have the cost  
7 breakdown. I just know that the office was working on other  
8 options trying to figure out a way to save money.

9                   MR. CROSS: Okay. Thank you.

10                  THE COURT: So, Mr. Tyson, what about that?

11                  MR. TYSON: Your Honor, I think we can -- we can take  
12 that to our client. I know that there is a lag time to get  
13 documents out of archives. And these are pretty voluminous  
14 obviously records.

15                  So why don't we do this? We can discuss this with  
16 our client, and then can we get -- I mean, our clients are  
17 literally still -- everybody is working on trying to get  
18 towards certification of the June 9th election right now.

19                  THE COURT: I know.

20                  MR. TYSON: So would Monday -- Monday -- Monday  
21 afternoon be acceptable to get an answer back to everybody?

22                  THE COURT: Sure. I mean, I'm going to extend the  
23 time for them to file their response until we can get through  
24 the end of this discussion in any event.

25                  So I don't remember what the due date was that -- you

1 were saying you wanted a response by the -- I think it was  
2 Monday. So I'm going to extend it at least -- at least through  
3 the end of -- basically until Thursday of next week. But I'm  
4 presuming that not everything -- not every single day of the  
5 week is going to end up being used for the legislative session.

6 I would like you to be able to be talking together on  
7 Monday. If you -- I have a sentencing that is at 2:30. So if  
8 you needed me, I would have to be available more like at the  
9 very end of the -- at 4:30.

10 I could not find today when I went to the office the  
11 sentencing documents. And Mr. Martin is away. So I sort of  
12 don't know what is involved exactly. He will be back on Monday  
13 morning.

14 All right. If you're able to talk first yourselves  
15 and agree, that is great. Let me know. We'll save 4:30 for  
16 you otherwise. That might end up slipping depending on how the  
17 sentencing goes because I don't know what is involved.

18 MR. CROSS: Thank you, Your Honor.

19 THE COURT: Hopefully, you can do this without me and  
20 come to a written agreement.

21 All right?

22 Okay. Thank you very much.

23 MR. BROWN: Thank you very much, Your Honor.

24 THE COURT: All right. Very good. Take care.

25 MR. CROSS: Thank you, Judge.

1 MR. RUSSO: Thank you.

2 (The proceedings were thereby concluded at 4:32  
3 P.M.)

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1 C E R T I F I C A T E

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3 UNITED STATES OF AMERICA

4 NORTHERN DISTRICT OF GEORGIA

5

6 I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of

7 the United States District Court, for the Northern District of

8 Georgia, Atlanta Division, do hereby certify that the foregoing

9 41 pages constitute a true transcript of proceedings had before

10 the said Court, held in the City of Atlanta, Georgia, in the

11 matter therein stated.

12 In testimony whereof, I hereunto set my hand on this, the

13 15th day of June, 2020.

14

15

16

17 *Shannon R. Welch*

18 SHANNON R. WELCH, RMR, CRR  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT

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